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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

UNITED STATES OF AMERICA,

Respondent-Appellee,

v.

NARCISA SAVINOVICH,

Petitioner-Appellant.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the minimum mandatory penalties established in the Narcotics Penalties and Enforcement Act of 1986 and the classification of punishment by quantity of contraband only without consideration of the purity of the substance or the role of the offender is so arbitrary and unreasonable as to deprive the defendant of due process of law, and equal protection of the law.

Whether the said mandatory penalties established by the statute constitute cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution.

Whether the mandatory minimum sentence classification under 21 U.S.C. 841 (B) (1) violates the Fifth and Eighth Amendments to the United States Constitution in that the statute precludes consideration by the Court of the peripheral role of a defendant, and denies defendants equal treatment under the law, because it allows prosecutorial discretion in plea bargaining and in determining the charges to be made against co-defendants involved in the same incident, resulting in unequal and cruel and inhuman sentencing.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Narcisa Savinovich, respectfully requests that a writ of certiorari issue to review the order and amended opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on July 6, 1988.

OPINION BELOW

The Ninth Circuit affirmed Mrs. Savinovich's conviction and denied her petition for rehearing en banc in a written order and amended opinion dated July 6, 1988, a copy of which is attached as Appendix A.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered by virtue of its order and amended opinion of July 6, 1988. A timely petition for rehearing had theretofore been filed in relation to the opinion of April 26, 1988. The Ninth Circuit order and amended opinion of July 6, 1988 included an order denying the petition for rehearing and rejecting a suggestion for rehearing en banc. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added)

The Eighth Amendment to the United

States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (Emphasis added)

The relevant statutory provision and classification is set forth in 21 U.S.C. 841(b)(1)(B)(ii) and (vii); the said statute is attached hereto as Appendix B.

STATEMENT OF THE CASE

On December 4, 1986 Mrs. Savinovich, together with her husband Rafael Villalobos-Padilla (Rafael), and Gustavo Palayo-Martinez (Gustavo) were arrested by Salem police officers and charged with violation of federal narcotics laws. Pursuant to a grand jury indictment of December 22, 1986, all three were charged in the U. S. District Court for the District of Oregon with counts of conspiracy to distribute cocaine and to possess with intent to distribute cocaine, intentional possession

with intent to distribute two kilograms of cocaine, and an intentional attempt to distribute two kilograms of cocaine. After various pre-trial motions and plea negotiations the defendants Rafael entered guilty pleas, Gustavo to charges which did not reference the two kilogram amount.

The defendant Savinovich stood by her not guilty plea because of her insistance that she was innocent. Her case was tried to a jury on all three counts on February 24 and 25, 1987, after the guilty pleas of Rafael and Gustavo. The trial court at the close of the government's case dismissed Count I, the conspiracy to distribute cocaine and to possess with intent to distribute (allegedly involving Rafael and Gustavo as co-conspirators). The jury returned a verdict of guilty as to Count II (possession with intent to distribute two kilos of cocaine) and Count III (attempt to distribute two kilos of

cocaine). The trial court dismissed defense motions for judgments of acquittal made at the close of the government's case, at the close of defendant's case, and again after discharge of the jury.

Judge Helen J. Frye on April 27, 1987 denied defendant's motion for order prohibiting the application of minimum mandatory sentence statutes, and imposed the five year minimum jail sentence mandated by the statute on May 4, 1987. The District Court stayed execution of the sentence and released defendant on her own recognizance pending appeal. Defendant, mother of two infant children, has no prior criminal record. Judgment was entered on May 11, 1987 and a timely appeal to the Ninth Circuit was filed. A motion for stay of the mandate is pending before the Ninth Circuit. Defendant remains free on her own recognizance, and faithfully reports to a probation person.

STATEMENT OF FACTS

Narcisa Savinovich is 24 years old. She is a citizen of Ecuador, with two children. Her parents and eleven brothers and sisters reside in New Jersey. The family came to the United States when she was a child. She attended high school in New Jersey, and attained the ninth grade. She is registered with the INS, but her children, ages 6 and 4, are citizens of the U.S. She remains close to family members; none have a criminal record. Her first husband died in New Jersey in 1981. She moved to Alaska to work, and met and married Rafael in 1982. Rafael is a Mexican national. He was a co-defendant and received a ten-year sentence as a result of his guilty plea. The family moved to Portland, Oregon in 1983. Rafael was convicted and served time in Oregon for possession of a controlled substance. This conduct caused a separation, but the

parties were reconciled at the time of the current charges. At the time of the events cited in the indictment, Mrs. Savinovich owned and operated the El Jolisurner, which was a Mexican food restaurant in Salem, Oregon. Her husband, Rafael, had no interest in the restaurant business.

Before trial, the defendant Gustavo pursuant to a negotiated plea was sentenced to two years only, on a one-count information charging unlawful use. The information pursuant to the plea negotiation made no reference to the "two kilos," amount of cocaine.

On opening, the government advised the jury of the nature of the charges, including the conspiracy charge. A Salem police officer, Jim Miller, had been working with a paid informant, Sergio Diaz, who was provided a flash roll of about $68,000. He drove to the restaurant and

met with Rafael and Gustavo at his car, outside of the restaurant. The informant was never called as a witness. The jury was told that the defendant Savinovich was later seen carrying a shopping bag with 4-5 pounds of cocaine (RT 40). Counsel for defendant on opening advised that defendant did own and work long hours at her restaurant in Salem, but that she had no knowledge of a cocaine distribution scheme between the government informant, and Rafael and Gustavo. Most certainly, she had no knowing possession of cocaine and did not attempt to distribute cocaine.

Government witness Ronald Nelson was a Salem police officer, involved in narcotics investigation, who worked with Salem officer Miller. On December 4, 1986, he conducted surveillance outside of the restaurant at 1111 Edgewater Street in West Salem, Oregon. At about 9:15 p.m., he saw government paid informant Diaz

arrive and park in front of the restaurant. Nelson identified Gustavo and Rafael talking with the informant Diaz at the car for about five minutes. Rafael then drove away alone in his car. Nelson followed him to 1915 Madrona Avenue, which was the residence of the defendant and her husband Rafael (RT 52-55). Nelson then waited and received radio instructions and observed an automobile operated by a famale with a male passenger, and followed it to 1167 8th Street N.W., Salem. This was Gustavo's residence. He then waited to execute a search warrant at the residence. He entered Gustavo's residence with the other police officers. He identified the defendant Savinovich as being in the residence. The restaurant was open for business to the public when he had seen Gustavo and Rafael talk to the informant Diaz by the car. Informant Diaz was paid $11,000 for the case. The witness never

saw Mrs. Savinovich at the restaurant.

Officer Timothy R. Diede of the Salem police assisted on December 4, 1986 and was assigned a surveillance role, near the residence of Gustavo. He did not see the car of defendant arrive. He assisted in the search of the Gustavo-Palayo residence. He entered at about midnight. He did not observe any packages or material on the couch. He identified the defendant Savinovich as being in the house. He was involved in controlling everyone, and in taking them into custody. He later observed two packages on the couch, next to another bag, a children's toggery bag (RT 61). He then saw two Ziplock bags on the couch with cocaine. At trial he specifically stated that the exhibit bags (Ex. 1, 2) were not the original packages that he had seen at the residence (RT 62). He felt the cocaine identified at trial was the same texture. At the residence, there

were a number of people present, including five children. It took three to five minutes to control everybody. He did not see the cocaine on the couch until after five to ten minutes from entry (RT 63).

A Portland police officer, Edward M. May, was working narcotics in conjunction with the Salem police. He was to conduct surveillance at 1915 Madrona (the residence of Rafael and defendant). He observed a 1981 Buick arrive about 9:05 p.m. He saw a male enter the residence from the car. He observed lights go on on the second floor. On execution of a search warrant later, he determined that the light went on in the upstairs master bedroom. They remained on for about thirty minutes. At 9:35 p.m. he saw two people come out of the house. The defendant Savinovich was carrying a white shopping bag. Rafael was not carrying anything, and got in the passenger side.

She drove (RT 66). He radioed to the other officers, and remained at the residence. His observations were made from bushes, on a rainy December night, across the roadway from the residence.

Salem police officer James Miller supervised paid informant Diaz, who was not a police officer (RT 71). Diaz was paid $11,000 for his services and was directed to purchase 2,000 grams or 2 kilos of cocaine, for $68,000. Diaz was given a flash roll on December 4, 1986. He did not intend to ever actually pay for cocaine. He followed Diaz to the restaurant, where he parked in front of the restaurant. Diaz went inside, and then returned to his car. One man came and sat in the front seat, and another arrived to look in the driver's window (RT 52-55). Diaz was instructed thereafter to go home. Officer Miller then went to the home of Rafael and defendant, 1915 Madrona. He

did not see persons come or go. He later assisted other officers in the search of the residence. It is a nice two-story house in a residential area. It has a large master bedroom on the second floor, with walk-in closets. He found a scale and a bag with money in the closet; the scale was set to 2000 grams, or 2 kilograms (RT 79).

Multnomah County Deputy Sheriff Wayne Sawyer was working under the direction of Officer Miller. He was one block from the Gustavo residence. He observed two cars arrive. The first dropped off a male person. Then a yellow Buick arrived. Defendant Savinovich got out of the driver's side, and Rafael out of the passenger side. Mrs. Savinovich carried a shopping bag in normal fashion (RT 82). They went inside the residence, When he thereafter entered the residence on execution of the search warrant, he first took Rafael into

custody (RT 84). When he secured Rafael and all persons in the residence were accounted for, he read rights. He then observed a shopping bag, tipped over a little, with a plastic bag. Gustavo lived at the residence with his wife, Imelda, and their children. Five minutes had expired after his arrival, and before he saw the shopping bag. At least five officers had entered the house.

Lionel Anthony Tucker, a chemist for the Drug Enforcement Administration analyzed government Exhibits 1 and 2, which were plastic bags containing a white substance (RT 90). He recalled receiving "the evidence," but felt there should have been "another bag." He took a portion out of each of the bags for quantitative and qualitative analysis. Both bags contained "a portion" which was cocaine, one (Ex. 1) 87% pure, and the other (Ex. 2) 95% pure. The total weight of the exhibits was 1788

grams (RT 92). The "analysis" took place in San Francisco. He has no knowledge as to where the government bags had been before his receipt of them. He took samples from larger bags. All of the bags were "government bags" (RT 95). No witness at trial traced the alleged cocaine from the Ziplock type bags apparently found on the couch, to the bags analyzed and offered. Officer Diede specifically stated that the exhibit bags were not in fact the bags found at the scene (RT 62) as follows:

> Mr. Noonan: Your Honor, may this witness please be shown what's marked as government's 1 and 2.
>
> The Court: Yes.
>
> Mr. Noonan: If those can be left with the witness.
>
> Q. (By Mr. Noonan): Now Officer Diede, I would ask you to examine those two packages and tell me if you have seen those before?
>
> A. The packages themselves, these aren't the original packages that the cocaine I seen was in. This was in the lab. But the cocaine is the same texture and the same size

> chunks and everything that I observed at the scene. (Emphasis added).

There was no evidence to establish that the cocaine weighed and analyzed was the same as that in Exhibits 1 and 2, and 1A and 2A. Yet the government rested. Neither did the chemist give the weight of the portion analyzed. At that point there was absolutely no evidence of a conspiracy involving defendant, nor of the defendants Rafael and Gustavo to distribute or possess with intent to distribute cocaine. Neither was there evidence to support a contention that defendant Savinovich knowingly and intentionally possessed with intent to distribute (Count II), nor that she knowingly and intentionally attempted to distribute cocaine. At most, the men outside of her restaurant and she was seen carrying a shopping bag. The trial court should have then granted the defendant's motions to dismiss as to all counts, not just the

conspiracy count.

The first defense witness was Rafael, the defendant's husband, who was in custody awaiting sentence on his guilty plea. He met the defendant when they worked together in Anchorage in a fish cannery. She owned the Salem restaurant, but he helped her out as a cook. Gustavo was a waiter. Enrique was a bus boy. Narcisa did not know anything about Sergio Diaz and his request of Gustavo to buy cocaine (RT 106). Gustavo was entrapped and used by the government agent, blinded by so much money. Rafael became involved by Gustavo, and knew of a person who had merchandise. He hid it for two days at home, and took it to Gustavo's house to enable Gustavo to give it to the informant (RT 106). Ms. Savinovich worked long hours at her restaurant, and Gustavo's wife, Imelda, was her babysitter for the children. She knew nothing of the cocaine. He simply had asked her to carry the

shopping bag and advised her that it was a present. It is customary for Mexican wives to follow orders and carry things for husbands. When they arrived at Gustavo's, where the defendant was going to pick up the girls, Narcisa knew nothing about the matter and was along only to pick up the girls (RT 108). Rafael intended to stay with Gustavo. He took the bag and placed it on the sofa, with a jacket over it. After five minutes the police knocked the door down. Rafael had a prior drug trafficking conviction, which occurred when his wife was in New Jersey. Rafael had hid the cocaine in the garage in a vacuum cleaner, and that night had taken it upstairs to the second floor. He had borrowed the scales from the same person who gave him the merchandise. Savinovich knew nothing about these matters. He confirmed that the government bags were not the "original packaging," as he had seen it before

placing it in the shopping bag (RT 117).

Imelda Palayo was called to confirm the baby sitting. She has three children. She and Gustavo rented a residence. Gustavo had never been involved in drugs, and she knew nothing of such a thing. On December 4, 1986, she was babysitting. Her husband arrived, and later Rafael and the defendant. The defendant went to the table where Imelda was ironing, and they talked about the children and food. Then the door was knocked down. She did not see a bag until the police discovered it later (RT 125). The police took the men and defendant. The children were left with her. She stated that Mexican women always take care of the man in whatever the may says.

The defendant's father was from Yugoslavia, and her mother was born in Ecuador. She had been a cashier in a supermarket, beautician, house cleaner, restaurant worker, and laborer in a cannery. She has

never been arrested, or charged or convicted of a crime. She and Rafael separated in 1985 because he was with another lady (RT 133). She then went to New Jersey with the child. Rafael was arrested on a drug matter and she returned to Oregon, and the parties reconciled (RT 134). She had no knowledge of any drug activity until after the arrest on December 4, 1986. She had opened her restaurant prior to that time and through long hours at work it was succeeding.

On December 4, 1986, she had worked since early in the morning and drove home about 9:00 p.m. Rafael was already at home, on the second floor. She had some juice. He then came down. They had to pick up the children and he asked her to carry a bag. She did not know its contents. They went to Imelda's where Rafael took the bag, and defendant talked with Imelda. Shortly, thereafter the police

broke the door down, and entered. She had no contact with and knew nothing of a deal with the informant. She never saw the scales. She knew nothing about her husband hiding cocaine in the vacuum in the garage (RT 142). She was shown pictures of guns, and denied knowledge or ownership of them. They have separate bedroom closets. She did not recognize the bag introduced by the government (RT 149). She did not and could not see what was in the bag she was asked to carry (RT 151). When they arrived at Gustavo's, her children welcomed her with a hug, and she played a bit with her children (RT 152). She was with her baby on the couch when the police came in, talking with Imelda.

On rebuttal, after the defense had rested, Officer Jim Miller was called to identify Rafael's scale (Ex. 8) which he found, just off the master bedroom. He also identified pictures of a sawed-off

shot gun, the gun itself, and a 25 caliber pistol. Only Rafael's prints were on the scales (RT 166-167) and on the shotgun.

No further evidence was offered to attempt to establish that the cocaine offered at trial (Exs. 1, 2) was in fact the cocaine allegedly found at the scene. Neither was evidence offered to show the purity of or trace that found at the Gustavo residence to the San Francisco lab, nor to explain the different bags or packages.

Counsel for the government on argument acknowledged the circumstantial nature of the government's case. The essential argument was that defendant had to have known the bag which she carried had cocaine in it, because "they" were negotiating to sell the cocaine for $68,000 and it had a street value of $200,000, and that because guns were found in the home, she must have had knowing possession and have participated in

an attempt to distribute. Neither the scales, nor the guns here conntected to defendant Savinovich.

REASONS FOR GRANTING THE WRIT

Section 841(b)(1) was amended by Congress in October 1986 as part of the Narcotics Penalties and Enforcement Act of 1986. Sections (b)(1)(B)(ii) and (vii) provide for imprisonment of not "less than 5 years or more than life" and a fine of up to $2,000,000 in the case of a violation of § 841(a) "involving... 500 grams or more of a mixture or substance containing a detectable amount of..." cocaine. These provisions prohibit probation, suspension of sentence or eligibility for, or release on, parole during the term of imprisonment imposed therein.

In the case of Mrs. Savinovich, defendant here, although she had no involvement whatsoever with the admitted scheme

developed by the paid government informant, and her husband and Gustavo, she faces a five-year jail sentence without possibility of parole. Gustavo, who responded to the paid informant's plan and actually made the contact and was involved in the contemplated transaction, will serve less than two years and be eligible for parole. There was no evidence that Mrs. Savinovich had knowledge of the contents of the bag, let alone the purity of the substance. Her only circumstantial role was to carry her husband's bag of only about four pounds in weight, en route to retrieve her children from the babysitter. There was no evidence in any event to connect up the cocaine produced at trial, or its purity to Mrs. Savinovich. These facts illustrate the irrationality, cruelty and unfairness of the mandatory jail sentence and statute, which precludes the judge at sentencing from considering the peripheral role of the

defendant. The statute suffers from the same cruelty and mischief as that encountered in the greatly challenged Sentencing Guidelines now before this Court. It precludes the trial judge from considering the lack of a criminal record of the defendant and her nominal and peripheral role.

The sentencing process, as well as the trial, must satisfy the requirements of the Due Process Clause of the United States Constitution. Gardner v. Florida, 430 U.S. 349, 358 (1977). If a statute creates a presumption of irrationality, then that statute violates due process and is invalid. See Stanley v. Illinois, 405 U.S. 645 (1972). The court must determine whether the statutory classification holds some relevance to the purpose for which the classification was made. Baxstrom v. Herold, 383 U.S. 107, 111 (1966).

The statutory classification of 21 U.S.C. § 841(b)(1)(B)(ii) and (vii) bears

no relevance to the classification's purpose. The purpose of the three-tier classification system is to establish more severe punishment for the large-scale drug dealers and manufacturers. The statute's failure, however, to classify according to the quality or purity of the narcotic defeats this purpose.

This statute contravenes the previously-held policy of the courts and the government that the purity of a controlled substance is of great relevance. The Ninth Circuit has noted that the purity of a drug is significant in determining the degree of drug involvement. U.S. v. Tebha, 770 F2d 1454, 1456 and n.2 (9th Cir. 1985). Furthermore, the government considers the purity as well as the quantity of a controlled substance when determining the category to assign offenders. The United States Parole Commission Offense Behavior Index, for example, in 28 C.F.R. § 2.20,

Chapter 9 (p. 96-97), an offender is put into category 8 if the offense involved 15 or more killograms of 100% purity cocaine "or equivalent amount." Equivalent amount is "computed as follows: 1 gram of 100% pure is equivalent to 2 grams of 50% pure and 10 grams of 10% pure."

Not only does the statute fail to consider the purity of the contraband, it fails to differentiate between primary actors in a drug-related offense and those individuals with only a peripheral role or limited knowledge. A defendant with the most peripheral role--chauffering a dealer to the sale-but still "involved" with the transaction of a large quantity of drugs is faced with a minimum mandatory prison term. Such a defendant on the periphery of a scheme to distribute cocaine, and believing the amount to be relatively small, will be given the same mandatory sentence as the primary actor, even though the

defendant lacked the primary actor's knowledge as to amount.

This statute contravenes existing policy of the government and the courts which hold that involvement and knowledge are of great relevance. The Parole Commission reduces the category of an offender if it finds that the offender "had only a peripheral role" in the criminal conduct. "Peripheral role" is defined as:

> conduct such as that of a person hired as a deckhand on a marijuana boat, a person hired to help offload marijuana, a person with no special skills hired as a courier of drugs on a commercial airline flight, or a person hired as a chauffeur in a drug transaction. 28 C.F.R. § 2.20, p. 96,99. See U.S. v. Wiley, 278 F2d 500 (7th Cir 1960).

This statute, therefore, violates due process as it contains no provision regarding the defendant's knowledge of the amount of narcotics involved, no provision regarding the extent of the role which the defendant played in the drug transaction, and no

provision to evaluate the purity of the controlled substance in relation to the given sentence.

Congress may make a reasonable classification of persons, but the classification must not be arbitrary and must be based upon some difference in the classes having a substantial relation to a legitimate object to be accomplished. Gulf Railroad Co. v. Ellis, 165 U.S. 150 (1896). A classification will not be upheld if "the varying treatment of different groups of persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." Vance v. Bradley, 440 U.S. 93, 97 (1979).

The Eighth Amendment of the United States Constitution "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." Solem v. Helm, 463 U.S. 277,

284 (1983). The Solem Court held: "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Id. at 290. The Court states that reviewing courts should grant substantial deference to the broad authority that legislatures possess in determining types and limits of punishments for crimes, but noted that "no penalty is per se constitutional." Id.

The Supreme Court in Solem stated three objective factors for guiding the courts in reviewing sentences under the Eighth Amendment: the gravity of the offense and the harshness of the penalty; the sentences imposed of other criminals in the same jurisdiction; and the sentences imposed for commission of the same crime in other jurisdictions. Id. at 290-91. Application of the first and second criteria requires that the minimum sen-

tences established for more serious crimes shofld be examined. Downey v. Perini, 518 F2d 1288, 1291 (6th Cir.), vacated on other grounds, 423 U.S. 993 (1975). The penalties for more serious crimes in the federal courts are uniformly less severe than the penalties established under the instant statute. Further, minimum mandatory sentences are rare in federal law, as are statutes which do not allow for parole. U.S. v. Ambrose, 740 F2d 505, 510 (7th Cir. 1984) (as of 1984, there was only one federal criminal statute that did not permit parole, and it has been called "among the most severe known to modern federal law ...").

This petition cannot, of course, include an exhaustive comparison of federal criminal offenses that carry less penalties, such as armed bank robbery, which under 18 U.S.C. § 2113(a) and (d) carries a sentence of 0-25 years. Therefore, armed robbery,

which is a less serious offense than that which the defendant herein has been convicted, as "nonviolent crimes are less serious than crimes marked by violence or threat of violence," carries a much less severe penalty. Solem at 292-93. Unlike the instant statute, armed robbery provides no mandatory minimum, probation is not precluded nor is suspension of sentence or eligibility of parole. The ten-year mandatory minimum established under § 841(b)(1) (A)(ii) and (vii) is the equivalent of a fifteen-year sentence under the armed robbery statute or virtually any other federal statute because of the mandatory two-thirds release date under those statutes. According to the Supreme Court in Solem, if more serious crimes are subject to the same penalty, or to less serious penalties, that is an indication that the punishment at issue may be excessive. Solem, 463 U.S. at 291. The

statute at hand is such a statute and thus, should be ruled unconstitutional.

The third criterion-comparing sentences for similar crimes in other jurisdictions--indicates that the penalties established under the instant statute are excessive. The Michigan Supreme Court in People v. Lorentzen, 387 Mich 167, 194 NW2d 827 (1972), held unconstitutional a mandatory minimum sentence of twenty years for the sale of any amount of marijuana as violative of the Eighth Amendment. The court noted that "the provision is equally applicable to a first offender high school student as it is to a wholesaling racketeer." Id at 831. The same is true of the statute at bench: A first offender with a peripheral role in the transaction is subject to a mandatory minimum of five years imprisonment if the quantity of the controlled substance is sufficiently large.

In re Foss, 10 Cal.3d 910 (1974), the California Supreme Court, interpreting the California Constitution, held that a statutory provision absolutely precluding parole consideration during the first ten years of a mandatory minimum sentence was constitutionally invalid as it was disproportionate to the offense committed. The court stated that ... "consideration should be given to the particular circumstances of the offenses committed." In Foss, the defendant had been convicted on five counts of furnishing heroin and previously had been convicted of heroin possession. Moreover, the court noted that it "appears that the penalty imposed by [the statute] is more severe than that imposed by the vast majority of the states of the Union. This provides us with further indication that the penalty is excessive ...[and] lengthy mandatory minimum terms without possibility of

parole are harsh and serve no legitimate penological purpose." Foss, 10 Cal 3d at 928.

The Foss and Lorentzen courts also questioned the effectiveness of mandatory minimum prison sentences without eligibility for parole. The California Supreme Court stated:

> "As pointed out further in People v. Lorentzen, supra, 194 N.W.2d 827, 833: 'Experts on penology and criminal corrections tend to be of the opinion that, except for extremely serious crimes or unusually disturbed persons, the goal of rehabilitating offenders with maximum effectiveness can best be reached by short sentences of less than five years' imprisonment.' Thus, where rehabilitation of the offender is of primary importance, the mandatory provision precluding parole consideration for the 10-year minimum period as provided by section 11501 is clearly excessive. Recommending against the imposition of mandatory minimum sentences, the President's Commission on Law Enforcement and Administration of Justice states: 'Within any classification of offenses, differences exist in both the circumstances and nature of the illegal conduct and in the offenders. Mandatory provisions deprive judges and correctional authorities of the ability to base their judgments on

> the seriousness of the violations and the particular characteristics and potential for rehabilitation of the offender.' (The Challenge of Crime in a Free Society GPO (1967) p. 223)." 10 Cal 3d at 924.

In the instant case, the imposition of the five-year mandatory minimum, as required under 21 U.S.C. § 841(b)(1)(B)(ii) and (vii), would be unusually harsh and serve no legitimate purpose. It treats this defendant, who is a first offender and, at most, played only the peripheral role of chauffeuring her husband and a controlled substance, the quantity and purity of which she did not know, to the destination of the sale arranged by the informant, as it would the wholesale racketeer. Such a sentence would be violative of the Fifth and Eighth Amendments.

CONCLUSION

The mandatory sentences established under 21 U.S.C. § 841(b)(1)(A) and (B) violate the defendant's rights to due process and equal protection of the law as guaranteed under the Fifth Amendment. The sentences are also violative of the defendant's rights under the Eighth Amendment. Accordingly, the statute should be striken from consideration in the sentencing of this defendant.

RESPECTFULLY SUBMITTED this 31st day of August, 1988,

Norman L. Lindstedt

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. NARCISA SAVINOVICH, *Defendant-Appellant.*	No. 87-3049 D.C. No. CR-86-277-03(FR) ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted
January 5, 1988—Portland, Oregon

Filed April 26, 1988
Amended July 6, 1988

Before: Cynthia Holcomb Hall and Diarmuid F. O'Scannlain, Circuit Judges, and William D. Keller,* District Judge.

Opinion by Judge O'Scannlain

*The Honorable William D. Keller, United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Criminal Law/Criminal Procedure/Evidence

Appeal from drug conviction. The court affirmed on numerous grounds.

A police informant agreed to buy two kilograms of cocaine from Villalobos, appellant Savinovich's husband, and Martinez. From her house, she carried a shopping bag apparently containing the cocaine and accompanied her husband on the transaction. Upon an executed search warrant of Martinez's house, a shopping bag with cocaine was found near Savinovich. Another executed search warrant on appellants' house disclosed scales and firearms. The district court granted her motion for a directed verdict on the conspiracy count. The jury found her guilty on two remaining counts.

[1] A proponent must show that the probative value of offered evidence is not substantially outweighed by the danger of unfair prejudice. **[2]** Because scales constitute one of the tools of the drug trade, they are probative of intent to distribute. **[3]** Guns are used in many drug transactions. Thus, an armed drug possessor may have something more in mind than mere personal use. **[4]** A person may not be convicted of illegal possession of contraband unless she can exercise dominion and control over it. Mere proximity to the drug or association with the person who controls the drug is insufficient. **[5]** Here, Savinovich exercised such dominion and control over the cocaine. **[6]** Actual knowledge is not necessary to support a conviction for possession of contraband if a defendant is aware of the high probability of possession and consciously disregards that possibility in an effort to remain ignorant. **[7]** Here, Savinovich acknowledges carrying a bag containing almost two kilos of cocaine. **[8]** Intent to distribute may be inferred from the purity, price, and quantity of the drug possessed. **[9]** Savinovich intended to distribute from

the fact that the cocaine she possessed weighed almost four pounds and was at least 87% pure. **[10]** She argues that the mandatory penalty scheme of 21 U.S.C. § 841(b)(1)(A)(ii) denies her due process and equal protection because it bases the severity of punishment on the quantity, rather than purity, of the drug possessed. **[11]** Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. **[12]** Congress clearly thought that dealers who possess substantial street quantities of drugs deserved severe punishment. **[13]** A criminal sentence must be proportionate to the crime. Three factors are considered. **[14]** Her sentence meets them.

COUNSEL

Norman L. Lindstedt, Lindstedt & Buono, Portland, Oregon, for the defendant-appellant.

Frank Noonan, Assistant United States Attorney, Portland, Oregon, for the plaintiff-appellee.

ORDER

On page 8177 of the slip opinion filed on April 26, 1988 delete the word "kilo-" in the third paragraph, line 3. The sentence should read as follows: "In a closet adjoining the master bedroom, they found a balance beam scale set at 2,000 grams and $4,000 cash."

The panel has voted to deny the petition for rehearing. Judges Hall and O'Scannlain have voted to reject the suggestion for rehearing en banc, and Judge Keller has so recommended.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

O'SCANNLAIN, Circuit Judge:

Savinovich appeals her convictions for possession of cocaine with intent to distribute and for attempted distribution, raising evidentiary issues. Savinovich also argues that the statute under which she was sentenced is constitutionally infirm because it classifies punishment according to quantity of cocaine possessed without regard to its purity. Finally, she contends that her mandatory five year sentence is cruel and unusual punishment. We disagree with her contentions and affirm the convictions.

BACKGROUND

Narcisa Savinovich and her husband, Rafael Villalobos-Padilla ("Villalobos") were charged in an indictment with (1) conspiracy to distribute cocaine; (2) possession of cocaine with intent to distribute; and (3) attempted distribution of cocaine, all in violation of 21 U.S.C. §§ 841(a)(1) and 846. Villalobos pleaded guilty and received a ten-year sentence. Savinovich pleaded not-guilty and was tried before a jury.

The jury heard testimony that a police informant agreed to buy two kilograms of cocaine from Villalobos and Gustavo Martinez, a waiter at a restaurant owned by Savinovich. The agreed price was $68,000. There was evidence that two kilograms of cocaine comprise 8,000 dosage units with a street value of approximately $100,000.

About fifteen minutes after the agreement was reached, police observed Villalobos enter a house he shared with Savinovich. Half an hour later, Villalobos and Savinovich were seen leaving the house. Savinovich carried a white shopping bag that "appeared to have some weight to it." She walked to the driver's side of a car, placed the bag on the seat, and got in behind the steering wheel. Villalobos entered the car on the passenger side. Later, police observed the same car arrive at Martinez's house. Savinovich got out on the driver's side and followed Villalobos into the house. She was seen carrying a white shopping bag that appeared to "contain something."

Shortly thereafter, police executed a search warrant on Martinez's house. They found a shopping bag, identified as the one Savinovich carried into the house, on a couch about two feet from where she was sitting. The shopping bag was partly tipped over, exposing a plastic bag full of a substance resembling cocaine. Another plastic bag of white powdery substance was found inside the shopping bag. One plastic bag contained 976 grams of 87% pure cocaine; the other contained 986 grams of 95% pure cocaine.[1] .

At the same time, police executed a search warrant on the Villalobos-Savinovich house. In a closet adjoining the master bedroom, they found a balance beam scale set at 2,000 grams and $4,000 cash. There were men's and women's clothing in the closet. In another closet, police found a smaller gram scale with residue resembling cocaine on it. Both scales were admitted over defense counsel's objection. Beneath the kitchen sink, police also found packaging material that appeared to have contained at least a kilo of cocaine.

[1]The cocaine evaluated by the DEA was contained in different bags from the ones found next to Savinovich. However, the defense did not object to the introduction of the new bags into evidence. For that reason, we decline to consider whether the chain of custody was broken and the evidence erroneously admitted. *See* Fed. R. Evid. 103(a)(1).

Testifying for the defense, Villalobos claimed that Savinovich did not know of the cocaine deal or that her shopping bag contained cocaine. Savinovich also testified that she knew nothing about the cocaine. She also denied knowledge of the scales or of several firearms found in her house.

In rebuttal, the government presented testimony that the scales were in plain view in both closets. Also, over objection, the government introduced two pistols found in the master bedroom closet and a sawed-off shotgun found in a kitchen cabinet.

At the close of the government's case in chief, the district court granted Savinovich's motion for a directed verdict on the conspiracy count, but denied it on the other two counts. The jury returned a guilty verdict on both remaining charges. Pursuant to 21 U.S.C. § 841(b)(1)(B)(ii), the trial court sentenced Savinovich to five years in prison followed by a special parole term of five years.

DISCUSSION

Admission of Scales and Guns

Savinovich argues that the district court's admission of the scales and firearms into evidence was unfairly prejudicial under Fed. R. Evid. 403. We disagree. We review a trial court's admission or exclusion of evidence under Rule 403 for abuse of discretion. *United States v. Crespo-de Llano*, 830 F.2d 1532, 1544 (9th Cir. 1987).

[1] Rule 403 requires the proponent to show that the probative value of the offered evidence is not substantially outweighed by the danger of unfair prejudice. *United States v. Conners*, 825 F.2d 1384, 1390 (9th Cir. 1987). Evidence creates unfair prejudice to the extent that the jury responds negatively to some aspect of the evidence unrelated to its tendency to make the contested fact more or less probable.

United States v. Johnson, 820 F.2d 1065, 1069 (9th Cir. 1987).

[2] Because scales constitute one of the tools of the drug trade, they are probative of intent to distribute. *See, e.g., United States v. LaGuardia*, 774 F.2d 317, 320 (8th Cir. 1985). Accordingly, scales found in a defendant's home are admissible to prove intent to distribute, not just to possess, contraband. *See United States v. Tebha*, 770 F.2d 1454, 1457 (9th Cir. 1985); *United States v. Rohrer*, 708 F.2d 429, 435 (9th Cir. 1983). Here, the district court admitted two scales found in plain view in Savinovich's closets. One scale had drug residue on it; the other was set at 2,000 grams, the agreed-upon weight for the cocaine deal. From this evidence the jury could reasonably infer that Savinovich intended to distribute, as well as to possess, cocaine.

[3] Because guns are used in many drug transactions, "[i]t may reasonably be inferred that an armed possessor of drugs has something more in mind than mere personal use." *United States v. Cannon*, 472 F.2d 144, 145 (9th Cir. 1972). Thus, guns seized from a defendant's residence are admissible in a trial for possession of a controlled substance with intent to distribute. *Crespo-de Llano*, 830 F.2d at 1544; *United States v. Restrepo-Rua*, 815 F.2d 1327, 1329 (9th Cir. 1987); *United States v. Issacs*, 708 F.2d 1365, 1371 (9th Cir.), *cert. denied*, 464 U.S. 852 (1983). The firearms found in Savinovich's home were admissible under Rule 403.

Sufficiency of Evidence

Savinovich argues there is insufficient evidence to support her conviction. Specifically, she argues that (1) she did not know her bag contained cocaine; (2) her possessory interest in the cocaine was insufficient to support conviction; and (3) there was no basis for the inference that she intended to distribute the drug. Viewing the evidence in the light most favorable to the government, we review these allegations to

determine whether a rational jury could find Savinovich guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

1. Possession

[4] A person may not be convicted of illegal possession of contraband unless she can exercise dominion and control over it. *United States v. Disla*, 805 F.2d 1340, 1350 (9th Cir. 1986). Mere proximity to the drug, presence on the property where it is located, or association with the person who controls the drug is insufficient to support conviction for possession. *See id.* at 1351. But if there is a rational basis for attributing interest in the contraband to one party because of relationship with another, a trier of fact can infer sufficient knowledge to support a conviction for possession. *United States v. Hood*, 493 F.2d 677, 681 (9th Cir.)(defendant was married to driver of drug-laden car and had reason to know his destination and criminal intent), *cert. denied*, 419 U.S. 852 (1974). Furthermore, a defendant's exclusive dominion over property on which contraband is found is strong circumstantial evidence of possession. *See United States v. Walitwarangkul*, 808 F.2d 1352, 1354 (9th Cir.), *cert. denied*, 107 S. Ct. 1909 (1987).

[5] Here, Savinovich exercised dominion and control over the cocaine when she carried it from her house to the car, drove it to Martinez's house, and carried it into his residence. *Compare Disla*, 805 F.2d at 1351. Moreover, there was thus a rational basis for the jury's association of Savinovich's interest in the cocaine with that of her husband. *See Hood*, 493 F.2d at 677.

2. Knowledge

[6] Actual or positive knowledge is not necessary to support a conviction for possession of contraband if a defendant is aware of the high probability of possession and consciously

disregards that possibility in an effort to remain ignorant. *United States v. Valle-Valdez*, 554 F.2d 911, 913 (9th Cir. 1977). Moreover, possession of large quantities of narcotics may alone be sufficient to support the finding of knowing possession. *Walitwarangkul*, 808 F.2d at 1354; *United States v. Collins*, 764 F.2d 647, 652 (9th Cir. 1985).

[7] Here, Savinovich acknowledges carrying a bag containing almost two kilos of cocaine from her home to her car, driving it to Martinez's house, and carrying it inside. Possession of such a large quantity of cocaine under these circumstances is sufficient to support the jury's finding of knowing possession. *See Walitwarangkul*, 808 F.2d at 1354; *United States v. Haro-Portillo*, 531 F.2d 962, 963 (9th Cir. 1976) (defendant driver's knowledge of possession could be inferred from driving vehicle laden with contraband). Moreover, when the police raided the house, cocaine was found in plain view two feet from Savinovich. *See Tebha*, 770 F.2d at 1457 (reasonable jury could find defendant knowingly possessed drug when parcel was partially open when officers arrived on scene).

3. Intent to Distribute

Under 21 U.S.C. § 841(a), aiders and abettors are liable as principals so long as the proof against them encompasses the same elements as would be required to convict the principal. *United States v. Normandeau*, 800 F.2d 953, 956 n.3 (9th Cir. 1986). A defendant need not actually sell drugs to aid and abet in their distribution. *See United States v. Weaver*, 594 F.2d 1272, 1275 (9th Cir. 1979). Rather, it is enough that the defendant associate with the criminal venture, participate in it, and seek by actions to make it succeed. *Id.*

Here, a rational jury could find that Savinovich associated with her husband's criminal venture by accompanying him on the transaction, and sought to make it succeed by driving the car and carrying the cocaine to the drop site. *See generally*

Weaver, 594 F.2d at 1275. Accordingly, there was sufficient evidence for the jury to infer that she aided and abetted the distribution of cocaine.

[8] Intent to distribute may be inferred from the purity, price, and quantity of the drug possessed. *See, e.g., Tebha*, 770 F.2d at 1456 (purity relevant to issue of whether defendant intended to "cut" drug and distribute it to others); *United States v. Ramirez-Rodriquez*, 552 F.2d 883, 885 (9th Cir. 1977)(evidence of resale value of drug probative of intent to distribute); *Turner v. United States*, 396 U.S. 398, 422-24 (1970)(intent to distribute drugs may be inferred from the amount seized). *See also United States v. Meyers*, 601 F. Supp. 1072, 1074 (D. Or. 1984).

[9] The jury could properly infer that Savinovich intended to distribute from the fact that the cocaine she possessed weighed almost four pounds and was at least 87% pure. *See United States v. Stewart*, 770 F.2d 825, 832 (9th Cir. 1985) (possession of one ounce of 80% pure cocaine sufficient to show an intent to distribute), *cert. denied*, 474 U.S. 1103 (1986). And the $100,000 street value of the seized cocaine is also evidence of her intent to distribute. *See Ramirez-Rodriquez*, 552 F.2d at 885.

Constitutionality

[10] Savinovich argues that the mandatory penalty scheme of 21 U.S.C. § 841(b)(1)(A)(ii) denies her due process and equal protection because it bases the severity of punishment on the quantity, rather than purity, of the drug possessed. Specifically, she argues that under the newly amended statute, a mere "street dealer" possessing cocaine which had been "cut" several times may serve a minimum mandatory sentence greater than a manufacturer possessing a smaller but purer quantity of the drug. Savinovich also argues that the minimum mandatory penalties prescribed under 21 U.S.C. § 841(b)(1)(A)(ii) constitute cruel and unusual punishment.

Our review is *de novo*. *See Polykoff v. Collins*, 816 F.2d 1326, 1335 (9th Cir. 1987)(review de novo district court's determination of federal constitutional law).

1. Purity of Drug

[11] "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966). For that reason, we are limited to an inquiry into whether the legislative classification under 21 U.S.C. § 841(b)(1)(B)(ii) is irrational or unreasonable. *See United States v. Alexander*, 673 F.2d 287, 288 (9th Cir.), *cert. denied*, 459 U.S. 876 (1982). *See also United States v. Holmes*, 838 F.2d 1175, 1178 (11th Cir. 1988)(we determine only whether Congress' judgment was rational).

Subtitle A of the Anti-Drug Abuse Act of 1986 prescribes minimum sentences of five years without parole for convictions involving 500 grams or more of a mixture involving cocaine. 21 U.S.C. § 841(b)(1)(B)(ii). In interpreting the penalty section of this statute, we may discern Congress' intent by looking to the language, structure, legislative history, and motivating policies of the statute in question. *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

[12] Congress was well aware that its punishment scheme did not focus on "the number of doses of the drug that might be present in a given sample." H.R. Rep. No. 845, 99th Cong., 2d Sess. Part 1 at 12 (1986). Instead, Congress chose a "market-oriented approach" to focus on those "who are responsible for creating and delivering very large quantities of drugs," including the "managers of the retail level traffic" selling "substantial street quantities." *Id.* at 11-12. Congress clearly thought that dealers who possessed substantial street quantities of drugs deserved severe punishment.[2] The classifi-

[2]During the floor debate, one senator commented extensively on the penalty provision of the bill:

cation scheme's focus on quantity is thus directly related to Congress' desire to prevent both wholesale and retail distribution of illegal drugs. A classification scheme, therefore, of mandatory punishments for possessors of more than 500 grams of cocaine is not unreasonable or irrational. *See Baxstrom*, 383 U.S. at 111; *Alexander*, 673 F.2d at 288. Although a street dealer possessing impure cocaine *could* be sentenced to a greater term than a higher-level dealer possessing a smaller amount of pure cocaine, "equal protection of the laws does not require Congress in every instance to order evils hierarchically according to their magnitude and to legislate against the greater before the lesser." *United States v. Holland*, 810 F.2d 1215, 1219 (D.C. Cir.)(interpreting Anti-Drug Abuse Act of 1986), *cert. denied*, 107 S. Ct. 2199 (1987).

2. Cruel and Unusual Punishment

[13] A criminal sentence must be proportionate to the crime for which the defendant has been convicted. *Solem v. Helm*, 463 U.S. 277, 290 (1983). In reviewing sentences under the eighth amendment, we must grant "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes[.]" *Id.* In evaluating the constitutionality of a penalty,

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> We divide these major drug dealers into two groups for purposes of fixing what the required jail terms shall be: For the kingpins — the masterminds who are really running these operations — and they can be identified by the amount of drugs with which they are involved — we require a jail term upon conviction [of 10 years]. . . Our proposal would also provide mandatory minimum penalties for middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail — a minimum of five years for the first offense and ten years for the second.

132 Cong. Rec. S. 14,301 (daily ed. Sept. 30, 1986)(statement of Senator Byrd).

we consider three factors: (1) the gravity of the offense and harshness of the penalty; (2) the comparison with sentences imposed on other criminals in the same jurisdiction; and (3) where appropriate, the comparison with sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 290-92.

Here, a grave offense was proven to have been committed: possession of 8,000 dosage units of cocaine worth $100,000 with intent to distribute. Congress has made the determination that those possessing this quantity of the drug are major traffickers and managers of retail level traffic. *See* footnote 2, *supra*. In light of the severity of the crime and drug-related problems of today's society, we find that the penalty is proportionate to the crime committed.

A comparison of Savinovich's sentence with punishments imposed for other crimes satisfies the second *Solem* criteria. Congress determined that the harm to society caused by the distribution of illegal drugs is so grave that the minimum mandatory penalties are a necessary deterrent.[3] We decline to undermine Congress' broad authority to make this determination.

Although all the sentences imposed under section 841(b) must meet the mandatory minimum requirement, harsher sentences handed down for drug possession crimes have withstood eighth amendment scrutiny. *See, e.g., United States v. Valenzuela,* 646 F.2d 352, 354 (9th Cir. 1980)(life sentence without parole for repeat drug-offender); *United States v. Wylie,* 625 F.2d 1371, 1380 (9th Cir. 1980)(20 year

[3]During the floor debate on the Anti-Drug Abuse Act, it was said that: "The widespread use of illegal drugs is one of the most pressing problems facing our society. Illegal drugs are killing children and destroying families. Vast profits from the sale of illegal drugs have created a new criminal underworld which promotes violence and feeds on death." 132 Cong. Rec. S. 14,282 (daily ed. Sept. 30, 1986)(statement of Senator Kennedy).

sentence for manufacture and distribution of LSD), *cert. denied,* 449 U.S. 1088 (1981).

[14] Because the mandatory five-year sentence imposed on Savinovich meets the criteria enunciated by the Supreme Court in *Solem,* it satisfies the eighth amendment.

AFFIRMED.

APPENDIX B

18 U.S.C. §2113 Bank robbery and incidental crimes (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny--

Shall be fined not more than $5,000 or imprisoned not more than twenty years or both.

* * *

(d) Whoever, in commiting, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

21 U.S.C. §841(b) Penalties. Except as otherwise provided in section 405, 405A, or 405B, any person who violates subsection (a) of this section shall be sentenced as follows:

* * *

(1)(B) In the case of a violation of subsection (a) of this section involving---

* * *

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substance referred to in subclauses (I) through (III);

* * *

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life,

a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, United States Code or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this Title or Title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the

provisions of Title 18, United States Code, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

28 U.S.C. §1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

28 C.F.R. § 2.20 Chapter Nine OFFENSES INVOLVING ILLICIT DRUGS.

* * *

Subchapter C - Cocaine Offenses

921 Distribution or Possession With Intent to Distribute

(a) If extremely large scale (e.g., involving 15 kilograms or more of 100% purity, or equivalent amount; or 1.5 kilograms or more of freebased cocaine), grade as Category Eight [except as noted

in (c) below];

(b) If very large scale (e.g., involving 5 kilograms, but less than 15 kilograms of 100% purity, or equivalent amount; or 500 grams but less than 1.5 kilograms of freebased cocaine), grade as Category Seven [except as noted in (c) below];

(c) Where the Commission finds that the offender had only a peripheral role, grade conduct under (a) or (b) as Category Six;

(d) If large scale (e.g., involving more than 1 kilogram, but less than 5 kilograms of 100% purity, or equivalent amount; or more than 100 grams, but less than 500 grams of freebased cocaine) grade as Category Six [except as noted in (e) below];

(e) Where the Commission finds that the offender had only a peripheral role, grade conduct under (d) as Category Five;

(f) If medium scale (e.g., involving 100 grams-1 kilogram of 100% purity, or equivalent amount; or 10 grams-100 grams of freebased cocaine), grade as Category Five;

(g) If small scale (e.g., involving 5-99 grams of 100% purity, or equivalent amount; or 1 gram-9.9 grams of freebased cocaine), grade as Category Four;

(h) If very small scale (e.g., involving less than 1.0-4.9 grams of 100% purity, or equivalent amount; or less than 1 gram of freebased cocaine), grade as Category Three;

(i) If extremely small scale (e.g., involving less than 1 gram of 100% purity, or equivalent amount), grade as Category Two.

922 Simple Possession

Category One.

* * *